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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/593,172

09/15/2006

Harold E. Cutler

065391-0002

8804

85688

7590

01/11/2010

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EXAMINER

STUART, COLIN W

ART UNIT

PAPER NUMBER

3771

MAIL DATE

DELIVERY MODE

01/11/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/593,172	Applicant(s) CUTLER, HAROLD E.	
	Examiner COLIN STUART	Art Unit 3771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 September 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 6,12 and 15-17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 6,12 and 15-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 06 July 2009 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. This office action is in response to the amendment filed 9/22/09. As directed by the amendment, claims 1-5, 7-11, 13-14, and 18-20 have been cancelled and claims 6, 12, and 15-16 have been amended and no new claims added. As such claims 6, 12, and 15-17 are pending in the instant application.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 6, 12, and 15-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pivovarov (2004/0211430) in view of Pivovarov (6,675,804).

In regards to claim 6, Pivovarov '430 shows an oral device which includes a mouthpiece member (18 & 32) being of a resilient material and compliant to the contours of the teeth of the wearer (para 0027 ln. 12-13 & Figs. 1 & 9); a tube member 16 being affixed at a first (anterior) end, to the mouthpiece member and extending rearward towards the oral cavity of the wearer; a palate member 12A extending from a second (posterior) end of the tube member and then angled upwards ending with a declined portion which maintains contact with the soft palate of the wearer, the second end of the tube member being opposite the first end of the tube member (see Figs. 1 & 9); and an attachment member ("connection locations for attachment of a strap (not shown)" para. 0030) the attachment member being attached to the mouthpiece in at least one location; whereby the tube member defines an opening which allows for the

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free transfer of air between the oral cavity of the wearer and the environment (see Figs. 1-9). Pivovarov '430 is silent as to the palate member being adapted to be adjustable in length independently of any other element. However, Pivovarov '804 teaches an oral device in which a "connector 16 is formed of resilient material shaped in an undulating sine wave pattern that allows for ... comfort and adjustability" (Pivovarov '804 col. 3 ln. 15). It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Pivovarov's '430 palate member with the undulating sine wave pattern for adjustability as taught by Pivovarov '804 because the adjustability feature provides ability for a more comfortable fit with the wearer.

In regards to claim 12, the modified Pivovarov device includes the elements as discussed above in rejection of claim 6 including the soft palate member 12A (palate member above) which extends rearward from a second end of the tube member and operable, independently of the tongue member, to maintain upward pressure against the soft palate of the wearer (due to adjustability of the modified Pivovarov device). The modified Pivovarov's device also includes a tongue member (12B Pivovarov '430) which extends rearward from the second end of the tube member and operable, independently of the palate member, to maintain downward pressure against the tongue of the wearer.

In regards to claim 15, the modified Pivovarov's device includes a soft palate member which extends rearward past the teeth of the wearer and through the oral cavity of the wearer, and is adapted to be adjustable in length so as to engage and lift the soft palate member. Note that the adjustability modification as discussed above, allows the soft palate member to be adapted to engage and lift the soft palate.

In regards to claim 16, the modified Pivovarov's device is silent as to the tongue member being adapted to be adjustable in length. However, as taught by Pivovarov '804, the adjustability feature can also be applied to the tongue member for the same reasons as discussed above in rejection of claim 6. As such, the tongue member is adjustable in length and capable so as to extend rearward past the teeth of the wearer along the top of the tongue and curved downwards to maintain contact with the tongue of the wearer.

4. Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pivovarov (2004/0211430) and Pivovarov (6,675,804) as applied to claim 12 above, and further in view of Jackson (5,174,284).

In regards to claim 17, the modified Pivovarov's device teaches all the limitations as discussed above, but is silent as to the attachment member being made of a resilient material. However, Jackson teaches an oral device which discloses attachment of "an elastic headband, not shown" (col. 2 ln. 61 of Jackson). It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the attachment member of the modified Pivovarov's reference to be made of a resilient elastic material as taught by Jackson in order to increase the comfort of the device and ensure a proper fit.

Response to Arguments

5. Applicant's arguments filed in the response dated 6/20/09 have been fully considered but they are not persuasive.

In regards to applicant's argument that the palate member of Pivovarov's device consists only of the upperwardly curved portion of structure 12 and differs from the application's 'three separate angles' (remarks/arguments) is not well-taken. The claim language calls for a "declined portion" (claim 6 ln. 7-8) which is taught by Pivovarov in its declining upward angled portion towards the posterior end of the device as shown in Fig. 1 of Pivovarov '430. There is no claimed recitation of three separate angles.

In regards to applicant's argument that the Pivovarov device cannot perform the independent adjustable features of the claimed invention is not well-taken. The modified Pivovarov's device is capable of adjusting either tongue or soft palate member independently as the adjustability feature taught by Pivovarov '804 can be applied to either or both component.

In regards to applicant's argument that the Pivovarov device does not contain the proper length to affect the soft palate is not well-taken. The Pivovarov device is able to contact the soft palate member of individuals as the anatomy of the human differs from person to person and a smaller adult or child's soft palate would be affected by the device.

Conclusion

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The following documents are considered to be pertinent art: Meah (6,257,238), Robertson et al. (2003/0089371), and Wright (2006/0207597) are all related to oral devices.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to COLIN STUART whose telephone number is (571)270-7490. The examiner can normally be reached on M-F 8:00-4:00.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Justine Yu can be reached on 571-272-4835. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/COLIN STUART/
Examiner, Art Unit 3771

/Justine R Yu/
Supervisory Patent Examiner, Art Unit 3771